

STATE OF MICHIGAN
COURT OF APPEALS

BEVERLY GRAY,

Plaintiff-Appellee,

v

STANDARD FEDERAL BANK,

Defendant-Appellant.

UNPUBLISHED

January 17, 2008

No. 269668

Wayne Circuit Court

LC No. 02-222917-CK

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant, Standard Federal Bank, appeals by delayed leave granted from an order denying its motion for a new trial or, in the alternative, remittitur of judgment entered July 29, 2005, in favor of plaintiff, Beverly Gray. Because we find that plaintiff has failed to state a cause of action independent from the mortgage contract, we reverse the trial court's order denying defendant's motion and remand for dismissal of the case.

In this case, plaintiff discovered that her property taxes had been miscalculated and stopped making mortgage payments after defendant refused to accept her adjusted monthly payment. On appeal, defendant argues that the trial court erred in denying its motion for a new trial because it improperly submitted the issue of negligence to the jury and erred in denying its motion for directed verdict because defendant did not owe plaintiff any duty independent of the mortgage contract.

"This Court reviews the trial court's denial of a motion for new trial for an abuse of discretion." *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 644; 705 NW2d 549 (2005). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, whether a party owes another a duty in a negligence action is a question of law that this Court reviews de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). This Court also reviews the trial court's denial of defendant's motion for a directed verdict de novo. *Cacevic v Simplimatic Engineering Co*, 248 Mich App 670, 679; 645 NW2d 287 (2001). In reviewing the trial court's decision, this Court reviews

the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and

resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ. If reasonable jurors could reach conclusions different than this Court, then this Court's judgment should not be substituted for the judgment of the jury. [*Id.* at 679-680 (internal citations omitted).]

To establish a prima facie case for negligence, a plaintiff must show: 1) a duty; 2) a breach of that duty; 3) causation; 4) and damages or injuries. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law." *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). The failure to properly perform a contractual duty may only give rise to a negligence action where a duty is breached "separate and distinct from those assumed under the contract." *Fultz, supra* at 461-462. However, "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and . . . a negligent performance constitutes a tort as well as a breach of contract." *Id.* at 465, citing *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). Regardless "a tort action will not lie when based solely on the nonperformance of a contractual duty." *Fultz, supra* at 466.

Defendant argues that, contrary to plaintiff's claim, it owed plaintiff no duty other than that imposed by the terms of the contract. The failure to properly perform a contractual duty may only give rise to a negligence action where a duty is breached "separate and distinct from those assumed under the contract." *Fultz, supra* at 461-462. However, "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and . . . a negligent performance constitutes a tort as well as a breach of contract." *Id.* at 465, citing *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). Regardless "a tort action will not lie when based solely on the nonperformance of a contractual duty." *Fultz, supra* at 466.

In finding defendant negligent, the jury's verdict indicated that defendant owed plaintiff a duty separate and distinct from the duties imposed by the contract, but did not specify the context of these duties. According to the complaint, plaintiff's negligence claim was based on defendant's failure to pay her property taxes, accept her mortgage payments, and conduct business with plaintiff in good faith. The mortgage contract required plaintiff to make monthly payments as calculated by defendant in accordance with RESPA based on "current data and reasonable estimates of expenditures" and required defendant to pay plaintiff's property taxes for which plaintiff would reimburse defendant should plaintiff not elect to pay these taxes directly. The contract also provided that plaintiff would be in default if she failed to remit her monthly payment in full.

In support of her allegation that defendant failed to pay her property taxes, plaintiff presented a tax statement indicating that her property taxes were delinquent for the years 1999, 2000, and 2001. Defendant, however, presented canceled checks and disbursement notes indicating that it had paid these taxes. Given the contractual terms previously noted, the determination of whether defendant paid plaintiff's property taxes was "based solely on the nonperformance of a contractual duty." *Fultz, supra* at 466.

Further, plaintiff failed to show that defendant had any duty to accept her mortgage payments. The mortgage contract indicated that plaintiff would be in default if she failed to

provide her monthly payment in full, and plaintiff discontinued making payments to defendant in February 2002 after defendant refused to accept the payments she had adjusted independently to correct the taxation error. Despite plaintiff's claim that the Michigan Tax Tribunal informed her of an error in the calculation of her property taxes in October 2001, defendant was not reimbursed for this taxation error until September 2002. Additionally, notwithstanding the fact that plaintiff provided defendant with information regarding the taxation error on October 31, 2001, plaintiff provided no evidence regarding when defendant was contractually bound to recalculate her mortgage payment. Indeed, Biesbrouck explained that defendant could not recalculate plaintiff's payment until it received notice of a taxation error from the Michigan Tax Tribunal. Plaintiff failed to present any evidence with respect to when defendant received such notice. In light of this, plaintiff failed to show that defendant breached any duty outside of that created by contract, let alone that defendant's actions constituted a breach of contract, or lack of good faith.¹

Therefore, because defendant owed no duty independent of the mortgage contract, the trial court erred as a matter of law in submitting the issue of negligence to the jury and denying defendant's motion for a directed verdict. *Burnett, supra* at 368. Although defendant requests that this Court grant a new trial, the appropriate disposition of this case is dismissal of plaintiff's claim against defendant. See *Napier v Jacobs*, 429 Mich 222, 243 n 14; 414 NW2d 862, reh den 439 Mich 1213 (1987) ("A defendant asserting that the evidence is insufficient to support a finding or verdict for the plaintiff does not seek a new trial, but rather dismissal of the complaint.")

In light of our resolution of this issue, it is unnecessary for us to address defendant's remaining issues on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

¹ Plaintiff claims that defendant presented no evidence at trial that it complied with RESPA. However, it is plaintiff's burden to establish a prima facie case for negligence and not defendant's to disprove plaintiff's claim. *Henry, supra*, 473 Mich 71-72. Although evidence was presented at trial that the mortgage contract was governed by RESPA, plaintiff presented no evidence specifically showing that defendant breached any duty under RESPA.